

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

THEODORE TSATSA,

Plaintiff,

vs.

DOCTOR BRUCE BANNISTER,  
Acting Medical Director, and  
N.D.O.C. U.R. Panel,

Defendants.

Case No. 3:06-cv-0686-BES-RAM

**ORDER**

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), is proceeding in this action *pro se*. Before the Court is Plaintiff’s Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (#1), Motions requesting status checks (##6, 8), and Application to Proceed *In Forma Pauperis* (#9-1).

**A. Application to Proceed *In Forma Pauperis***

Plaintiff, who is housed at Nevada State Prison (“NSP”), submitted his Civil Rights Complaint on December 14, 2006. (#1.) Plaintiff paid the \$350 filing fee in full at that time. Subsequently, Plaintiff wrote several letters to the Court requesting status updates on his case. (See ## 3, 4, 5, 6, 7, 8, 9.) With his most recent letter, Plaintiff also submitted an Application pursuant to 28 U.S.C. § 1915 to proceed *in forma pauperis* (#9-1), apparently believing that his failure to previously submit the application was preventing his case from proceeding. However, the Plaintiff has already paid the full filing fee in this matter. Therefore, the Court denies his Application to Proceed *In Forma Pauperis*.

**B. Screening of the Complaint**

The Court must now screen the Complaint pursuant to 28 U.S.C. § 1915A. Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity

1 or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must  
2 identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim  
3 upon which relief may be granted or seek monetary relief from a defendant who is immune from such  
4 relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed.  
5 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C.  
6 § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws  
7 of the United States was violated, and (2) that the alleged violation was committed by a person acting  
8 under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

9 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation Reform  
10 Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of poverty is  
11 untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may be granted,  
12 or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).  
13 Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in  
14 Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under § 1915 when  
15 reviewing the adequacy of a complaint or an amended complaint. When a court dismisses a complaint  
16 under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing  
17 its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured  
18 by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

19 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
20 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim  
21 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would  
22 entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this  
23 determination, the Court takes as true all allegations of material fact stated in the complaint, and the Court  
24 construes them in the light most favorable to the plaintiff. *See Warsaw v Xoma Corp.*, 74 F.3d 955, 957  
25 (9th Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than formal  
26

1 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519,  
2 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed factual  
3 allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*  
4 *Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action  
5 is insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

6 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the  
7 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal  
8 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of  
9 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
10 allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);  
11 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

#### 12 **1. Defendants**

13 Plaintiff has sued Defendant Bruce Bannister, the Acting Medical Director for NDOC, in both his  
14 individual and official capacities. In *Kentucky v. Graham*, the Supreme Court clarified the distinction  
15 between official and personal capacity suits. 473 U.S. 159, 165 (1984). The Court explained that while  
16 individual-capacity suits seek to impose personal liability upon a government official for actions  
17 performed under color of state law, official capacity actions generally represent another way "of suing  
18 an entity of which an officer is an agent." *Id.* (quoting *Monell v. New York City Dep't of Social Services*,  
19 436 U.S. 658, 690 n.55 (1978)). In order to establish personal liability in a §1983 action, a plaintiff must  
20 show that an individual, acting under color of state law, caused a deprivation of a federal right. *Graham*,  
21 473 U.S. at 166. By contrast, in an official-capacity action, a plaintiff must demonstrate that a policy or  
22 custom of an entity contributed to the violation of a federal law. *Id.*; *Hafer v. Melo*, 502 U.S. 21, 25  
23 (1991). That is to say, "the action that is alleged to be unconstitutional implements or executes a policy  
24 statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."  
25 *Monell*, 436 U.S. at 690.

1 Generally, “[t]o state a claim under § 1983, a plaintiff must allege the violation of a right secured  
2 by the Constitution and laws of the United States, and must show that the alleged deprivation was  
3 committed by a person acting under color of state law.” *West*, 487 U.S. at 48 (citation omitted). States  
4 and state officers sued in their official capacities are not “persons” for purposes of a § 1983 action and  
5 may not be sued under the statute. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). On the  
6 other hand, § 1983 allows suits against state officers in their individual capacities for acts they took in  
7 their official capacities. *Hafer*, 502 U.S. at 26. However, state officials sued in their official capacity for  
8 injunctive relief are persons for purposes of § 1983. *See Will*, 491 U.S. at 71 n.10.

9 Here, Plaintiff is seeking injunctive relief and is asserting that the cataract surgery policy is the  
10 moving force behind the alleged violations. Therefore, Plaintiff has articulated a cause of action against  
11 Defendant Bannister in both his individual and official capacities.

12 Plaintiff also sues “unknown” members of the U.R. Panel who “created the existing cataract-  
13 removal policy for surgery” in their individual and official capacities. Plaintiff must provide information  
14 as to the identity of these individuals so that service of process can be effected. Until such identifying  
15 information is provided, this matter cannot proceed against those defendants. Plaintiff’s claims against  
16 “unknown” defendants are therefore dismissed, with leave to amend.

## 17 **2. Cause of Action**

18 Plaintiff alleges that Defendants violated his constitutional rights under the Eighth and Fourteenth  
19 Amendments. Plaintiff asserts that he has been repeatedly denied cataract surgery in his right eye due to  
20 a policy that prohibits surgery if there is vision in the other eye. He also states that he has been denied  
21 tinting in his glasses to reduce glare from the cataracts. Plaintiff asserts that, although he has 20/30 vision  
22 in the left eye, his vision is so poor that he routinely bumps into structures and corners, causing bodily  
23 injuries, and bumps into other inmates, resulting in heated exchanges and physical altercations. Plaintiff  
24 further contends that he lives in a constant state of apprehension when walking around other prisoners  
25  
26

1 because of his blindness. Plaintiff alleges that the medical policy and his denial of cataract surgery create  
2 medical indifference to his serious medical needs in violation of the Eighth and Fourteenth Amendments.

3 “[D]eliberate indifference to a prisoner’s serious illness or injury states a cause of action under  
4 section 1983.” *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). “A ‘serious’ medical need exists if the failure  
5 to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton  
6 infliction of pain.’” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (quoting *Gamble*, 429 U.S.  
7 104), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en  
8 banc). Deliberate indifference is subjective. The prison official cannot be held liable “unless the official  
9 knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of  
10 facts from which the inference could be drawn that a substantial risk of harm exists, and he must also  
11 draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). “A defendant must purposefully  
12 ignore or fail to respond to a prisoner’s pain or possible medical need in order for deliberate indifference  
13 to be established.” *McGuckin*, 974 F.2d at 1060. However, a difference of opinion over the appropriate  
14 course of treatment does not amount to deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th  
15 Cir. 1989). The court should consider whether a reasonable doctor would think that the condition is  
16 worthy of comment, whether the condition significantly affects the prisoner’s daily activities, and whether  
17 the condition is chronic and accompanied by substantial pain. *See Lopez v Smith*, 203 F.3d 1122, 1131-32  
18 (9th Cir. 2000) (en banc); *Doty v. County of Lassen*, 37 F.3d 540, 546 n.3 (9th Cir. 1994) (citing  
19 *McGuckin*, 974 F.2d at 1059-60).

20 In order to show deliberate indifference to a serious medical need in violation of the Eighth  
21 Amendment, a plaintiff must show “(a) purposeful failure to respond to a prisoner’s pain or possible  
22 medical need and (b) harm caused by the indifference.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.  
23 2006). Here, Plaintiff has articulated a failure to respond to his medical needs and harm that resulted  
24 from it. Further, Plaintiff’s alleges that condition affects his daily activities. Thus, Plaintiff has stated  
25 a cognizable claim under the Eighth and Fourteenth Amendments.

1 **C. Conclusion**

2 Plaintiff stated cognizable claims against Defendant Bannister in his individual and official  
3 capacities for violations under the Eighth and Fourteenth Amendments. Plaintiff's claims against  
4 "unknown" Defendants of the U.R. Panel will be dismissed, with leave to amend.

5 Based on the foregoing, and with good cause appearing,

6 IT IS ORDERED that Plaintiff's Application to Proceed *in Forma Pauperis* is **DENIED**.

7 IT IS FURTHER ORDERED that the Clerk of the Court shall file the Complaint.

8 IT IS FURTHER ORDERED that the Clerk shall send a copy of the Complaint and this Order to  
9 the Office of the Attorney General, c/o Pamela Sharp, 100 North Carson St., Carson City, NV 89701-  
10 4717. The Attorney General shall advise the Court within twenty (20) days from the date that this Order  
11 is entered service of process for the named defendants is accepted. Counsel shall file an answer or  
12 otherwise respond to the complaint within forty-five (45) days from the date that this Order is entered.  
13 If service cannot be accepted for any of the named defendants, then Plaintiff will need to file a motion  
14 identifying the unserved defendant(s), requesting the issuance of a summons, and specifying a full name  
15 and address for said defendant(s). Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service  
16 must be completed within one hundred twenty (120) days from the date that this Order is entered.

17 IT IS FURTHER ORDERED that henceforth, Plaintiff shall serve upon defendants or, if  
18 appearance has been entered by counsel, upon the attorney(s), a copy of every pleading, motion or other  
19 document submitted for consideration by the court. Plaintiff shall include with the original paper  
20 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed  
21 to the defendants or counsel for the defendants. The Court may disregard any paper received by a district  
22 judge or magistrate judge which has not been filed with the Clerk, and any paper received by a district  
23 judge, magistrate judge or the Clerk which fails to include a certificate of service.

24 IT IS FURTHER ORDERED that Plaintiff shall have thirty (30) days from the date this Order is  
25 entered in which to submit an amended civil rights complaint. The Clerk shall send Plaintiff two copies  
26

1 of the form Civil Rights Complaint Pursuant to 42 U.S.C. § 1983. Plaintiff shall write the words “First  
2 Amended” above the caption of his amended complaint. The amended complaint must be a complete  
3 document in and of itself, and will supersede the original complaint in its entirety. Plaintiff’s failure to  
4 submit an amended complaint in the time and manner provided by this Order will result in the dismissal  
5 of all or part of his civil rights complaint for the reasons stated in this Order.

6 IT IS FURTHER ORDERED that Plaintiff’s motions for status checks (## 6, 8) are denied as  
7 moot.

8 DATED: March 17, 2008.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26



UNITED STATES MAGISTRATE JUDGE